SEP 12 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 399

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

GEORGIA, ASHBURN, SYLVESTER & CAMILLA RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

H. H. PERRY, JR.,
Peacock Building,
Albany, Georgia.

NORMAN C. SHEPARD,
FRANK G. KURKA,
P. O. Box 461,
Wilmington, N. C.,
Attorneys for Petitioner.

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v.
GEORGIA, ASHBURN, SYLVESTER & CAMILLA RAILROAD COMPANY,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of Georgia, or, in the Alternative, to the Court of Appeals of Georgia:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia in the above case decided February 17, 1955, rehearing denied March 17, 1955, and the judgment of the Supreme Court of Georgia in denying Petitioner's petition for writ of certiorari to review the judgment of the Court of Appeals of Georgia entered on May 10, 1955, motion for reconsideration denied June 15, 1955.

Opinion Below.

The judgment of the Superior Court of Worth County, Georgia is unreported. The opinion of the Court of Appeals of Georgia. (R. 42) reported in Ga. App. , 87 S. E. 2d 92, is here reproduced as Appendix "A",

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infra, page 12. The Order of the Supreme Court of Georgia denying Petitioner's petition for writ of certiorari and denying the motion for reconsideration are unreported (R. 85, 91).

Jurisdiction.

The judgment of the Court of Appeals of Georgia having been entered on February 17, 1955, rehearing denied without opinion March 17, 1955, and the Supreme Court of Georgia having denied petition for writ of certiorari on May 10, 1955, and having denied a motion for reconsideration on June 15, 1955, the jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

Questions Presented.

Petitioner sued Respondent upon contract dated May 21, 1906 (reproduced here as Appendix "B", *infra,* p. 19), to recover upon the terms thereof one-half the cost of installing "new and improved signals" protecting the crossing of Respondent's railroad tracks with those of the Petitioner, to comply with an order of the Interstate Commerce Commission made effective September 1, 1939. The question is:

Is the contract for the installation of "new and improved signals" so vague and indefinite as to render the contract unenforceable because of its failure to describe or designate with sufficient particularity the kind, quantity, or quality of signals that must be installed when the standard that must be met is that prescribed by the Interstate Commerce Commission.

Comprehended within that question is the subordinate question: Can the State Court validly hold the contract

to be unenforceable for lack of certainty when the contract itself provides the standard by which the alleged ambiguity is cured?

Statutes Involved.

The pertinent statute involved herein is Section 26(b) of Title 49 U. S. C., viz.:

> "(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cabsignal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad such order to be issued and published a reasonable time (as determined by the Commission) in advance of the date for its fulfillment . . .".

Also pertinent is the Fifth Amendment to the Federal constitution:

> "AMENDMENT V.
>
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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Statement of the Case.

This litigation has had a tortuous history, two prior jury verdicts for Petitioner for the full amount sued for on the same cause of action having been reversed by the Court of Appeals of Georgia (54 S. E. 2d 492; 76 S. E. 2d 724), those decisions having no bearing on the questions presented here.

During 1944 under compulsion of an order of the Interstate Commerce Commission made effective September 1, 1939, Petitioner completed new and improved signals as prescribed by the Commission to protect the crossing of its railroad tracks with those of the Respondent at Sylvester, Ga., at a total cost of $3,076.50 (R. 5), following Respondent's refusal to install such signals in compliance with contract between Petitioner and the Flint River and Gulf Railroad Company, its successors and assigns, dated May 21, 1906 (R. 6, Appendix B). Upon completing said project Petitioner billed the Respondent as the successor of the Flint River and Gulf Railroad Company for one-half the cost of such installation in accordance with the terms of said contract, which respondent refused to pay upon the ground *inter alia* that it was not bound by the terms of the contract theretofore made by its predecessor. This action was thereupon instituted.

At the conclusion of plaintiff's (Petitioner's) evidence the trial court sustained Respondent's motion for nonsuit, from which Petitioner appealed to the Court of Appeals of Georgia. The Appellate Court below ruled that the covenant regarding the alteration, improvement and installation of the new and improved signals was a covenant running with the land, which was binding on Respondent as the successor in title to the easement created by the contract

in favor of its predecessor, the Flint River and Gulf Railroad Company.

The Respondent also set up as a defense that the contract upon which the suit is predicated is too vague and indefinite as to the time of its performance to be enforceable. The Court of Appeals of Georgia ruled that this point was not well taken, holding the contract to be perpetual in its nature.

As a further defense Respondent also urged that the provisions of the covenant by which its predecessor was obligated to install new and improved signals was too indefinite because of its failure to describe or designate with sufficient particularity the kind, quality, or quantity of signals that must be installed or the work to be performed and materials to be furnished to meet the requirements of the covenant. On this issue only the Court of Appeals of Georgia ruled that the contract was unenforceable. (Opinion, Appendix A, *infra*, p. 12).

During the course of its opinion the Court below held in part:

> "In the contract now under consideration the signals to be supplied could have been legally described as 'comparable in number, nature, and design to those commonly used or in vogue in the general territory severed (sic) by the contracting railroads, and by railroads of the class to which either or both of the railroads belonged, at such times as the signals might be installed agreeably to the terms of the contract.' *Or it might have been provided that such signals be installed as would meet the approval of the public authorities having jurisdiction of such matters at the time of their installation.* The vogue in signals might vary, but the requirements of such provisions would always furnish a fixed standard, a criterion as to the kind, quality, and quantity of the signals to be supplied." (Emphasis supplied.)

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Reasons for Granting the Writ.

ARGUMENT.

In deciding that the fatality for indefiniteness might have been cured had the contract provided "that such signals be installed as would meet the approval of the public authorities having jurisdiction of such matters at the time of their installation", the Court of Appeals overlooked that the new and improved signals were in fact installed to meet the approval of the public authorities having such jurisdiction, i. e., the Interstate Commerce Commission.

Article Seventh of the contract provides that the new and improved signals shall be installed "under the same terms as provided for in the original installation, that is to say, (1) whenever required by the public authorities of the State of Georgia or whenever Petitioner shall deem it proper and advisable; and (2) the cost to be borne equally by the parties."

The contract of 1906 clearly expressed the intention of the parties that the public authorities having jurisdiction of such matters, then the State of Georgia, should determine the kind, quality and quantity of new and improved signals. By the enactment of the Transportation Act of 1920 (Title 49 USC, Section 26 (b)) Congress transferred such authority as the states may have had over the subject matter of signals to the Interstate Commerce Commission.

When Congress pre-empted the field and vested authority with respect to signals and the like in the Interstate Commerce Commission, it acquired the authority and jurisdiction the several states theretofore had over that subject and thereby became completely substituted for such state authority.

Napier v. *ACL RR Co.* 272 U. S. 605, 71 L. ed. 433;

Atchison, T. & S. F. R. Co. v. *Scarlett,* 300 U. S. 471, 81 L. ed. 748.

The mere substitution of the authority of the Interstate Commerce Commission for that of the State of Georgia did not alter the clear and unambiguous intent of the parties. The important and signficant provision of the contract is the phrase "whenever it shall be required by the public authorities", the words "of the State of Georgia" being merely descriptive.

Thus it will be seen that the Court of Appeals of Georgia in one breath condemns the provision for being vague and indefinite but in the next breath offers the advice that such purported fatality could have been cured in the very manner actually provided by the contract.

We confidently assert that in failing and refusing to apply to the contract the very standard of interpretation which it prescribed, the Court of Appeals deprived Petitioner of its property without due process of law in violation of the Fifth Amendment to the Federal Constitution.

The court below assumed that the determination with respect to the kind, quality and character of the new and improved signals had been made by Petitioner, and that being the case ruled that the contract fell within the type condemned in *Hart* v. *Georgia Railroad Company,* 101 Ga. 188, 28 S. E. 637. The ruling below turned on that decision. Our situation here is wholly different and distinguishable.

It is a well-recognized principle that courts will, if possible, so construe agreements as to carry into effect the reasonable intention of the parties. In examining the decision below one is impressed with the manner in which the Court of Appeals of Georgia struggled to strike down

a portion of this contract for uncertainty, thereby permitting Respondent to enjoy the easement granted to it without obligation even to assume any part of the expense of providing new and improved signals in compliance with the order of duly constituted authority which, of course, would not have been necessary except for the existence of the easement and the crossing.

The spirit and the purpose of an agreement, as well as its letter must be regarded in the interpretation and application thereof. In fact, it is the substance of an agreement rather than its form—the spirit rather than the letter—which must control its interpretation. 12 Am. Jur. 776, Contracts, Section 242.

This Court has held that "a thing is to be regarded as certain which can be made certain; . . ."

> *Jones* v. *N. Y. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. ed. 1030.

In construing a Georgia contract, the Court of Appeals for the Fifth Circuit in

> *James Talcott, Inc.* v. *Fullerton Cotton Mills* (CA-5, 1953), 208 F. 2d 81,

quoted with approval the general principles governing the interpretation of contracts, as follows:

> "The fact that a sufficiently exact meaning can be ascertained only by considering admissible evidence of extrinsic facts does not render the agreement invalid for indefiniteness. The maxim *'id certum est quod certum reddi potest'* applies. An agreement need not contain definitely and specifically every fact in detail to which the parties may be agreeing; it is sufficient if the phrases can be made certain by proof." 12 Am. Jur., Contracts, Section 65.

> "Nor is it necessary that a contract shall state definitely and specifically all facts in detail to which the parties may be agreeing, but as to such matters it will be sufficiently definite and certain if it contains matter which will enable the courts, under proper rules of construction, to ascertain the terms and conditions on which the parties intended to bind themselves. That is certain which may be made certain. 6 R. C. L. 645, Sec. 59; 12 Am. Jur. 560, Sec. 69; Southwest Pipe Line Co. *v.* Empire Natural Gas Co., 8 Cir., 33 F. 2d 248, 64 A. L. R. 1229, 1234; Dorsey *v.* Clements, 202 Ga. 820, 44 S. E. 2d 783, 787, 173 ALR 509."

The maxim "id certum est quod certum reddi potest" applies here with equal force, but the court below refused to give effect to that doctrine.

As we have shown above, we are dealing with an executed contract, the benefits of which Respondent and its predecessor have enjoyed for many years. Even if the conditions of the contract are indefinite (which we deny) such defect is cured by performance if the intent of the parties can reasonably be ascertained. The precise point is covered in the Restatement of the Law of Contracts by the American Law Institute, Section 33:

> "An offer which is too indefinite to create a contract if verbally accepted, may, by entire or partial performance on the part of the offeree, create a contract."

General Paint Corp. v. *Kramer* (CCA-10, 1932) 57 F. 2d 698; certiorari denied 287 U. S. 605, 77 L. ed. 526;

Phillips Petroleum Co. v. *Rau Construction Co.* (CCA-8, 1942), 130 F. 2d 499; certiorari denied 317 U. S. 685, 87 L. ed. 549.

The court below recognized that the "contract did not reserve to the Plaintiff (Petitioner) an unlimited right to determine the nature and extent of the defendants (Respondent's) performance of the covenant referred to." That right to require the installation of new and improved signals was reserved upon "the same terms as provided for in the original installation", which included an undertaking for performance whenever required by the public authorities. The performance having been made under such authority, the contract cannot be said to be too vague and indefinite under the criterion established in the *Hart* decision.

Langenback v. *Mayo, et al.* (Ga., 1949), 205 Ga. 706, 54 S. E. 2d 401.

The decision below being in conflict with general law, and with the decisions of this Court and of the inferior Federal Courts, and indeed inconsistent with itself, should be reversed. Its effect as a precedent is of great importance upon the interpretation of innumerable contracts, far beyond the miscarriage of justice which it represents between the parties litigant to this proceeding.

Conclusion.

WHEREFORE, the Petitioner prays that a writ of certiorari be issued herein directed to the Court of Appeals of the State of Georgia, and/or to the Supreme Court of the State of Georgia, to the end that the decisions and rulings of those courts which have the effect of abrogating

the terms of a solemn executed contract, be set aside and corrected.

Respectfully submitted,

H. H. Perry, Jr.,
Peacock Building,
Albany, Georgia,

Norman C. Shepard,
Frank G. Kurka,
P. O. Box 461,
Wilmington, N. C.,
Attorneys for Petitioner.

Appendix A.

Opinion of the Court of Appeals.

QUILLIAN, J. We will consider the assignments made in both the main and cross bill of exceptions, and dispose of them in this opinion. The main bill of exceptions raises the question as to whether trial court should have granted a non suit, that is whether the plaintiff failed to make out a prima facie case. The cross bill of exceptions raises the question as to whether the petition failed to set out a cause of action.

In order to properly appreciate the matters for consideration both as to the pleading and proof of the case it should be noted that there are three covenants contained in seventh paragraph of the contract entered into by the plaintiff and Flint River & Gulf Railroad Company, Defendant's predecessor in title. The first of these is to erect, maintain and operate gates including derailing switches; the plans of the same and the erection to be approved by the Engineer of Roadway of the party of the first part.

The second of these provided whenever it shall be required by the public authorities of the State of Georgia, or it should be deemed proper and advisable by the party of the first part, an interlocking plant including the proper protection of the crossing by interlocking signals and derailing switches shall be constructed and maintained at said crossing under the plans and direction of the said party of the first part. The costs of the installation of said interlocking plant was to be borne by the parties hereto in equal proportions, this is, half and half; but the cost of maintenance of the said interlocking plant and its operation shall be at the sole costs of the party of the second part.

The third covenant was to alter and improve or erect new and improved signals upon demand of the party of the first part under the same terms as provided for in the original installation.

The suit is predicated upon its alleged breach by the defendant in refusing upon the plaintiff's demand to alter, improve and erect "new and improved signals."

We shall first consider the sufficiency of the petition.

The demurrer attacks the petition on the ground that the covenant of the contract between the plaintiff and obligating Flint River & Gulf Railroad Company, the defendant's predecessors in title to alter, improve and erect new, and approved signal devices is not binding upon the defendant railroad because it was not a party to the contract, and that the covenants were merely the personal undertaking of the Flint River & Gulf Railroad Company for breach of which the defendant as its successor in title could not be held liable. It must be conceded if the covenant referred to was a covenant running with the land the successors, to the easement granted by the plaintiff under the terms of the contract would be responsible for its faithful performance.

The covenant to improve, alter or erect new and improved signals, upon demand of the plaintiff, without question did relate to the interest in the easement granted, so that its performance or non-performance did affect the quality, value, and use made of the easement. This is exactly what has been held to constitute a covenant running with the land. Atlanta, Knoxville and Northern Railway Co. *v.* McKinney, 124 Ga. 929. But the defendant asserts that in order for a covenant to fall within the category of those running with the land, it must relate to a thing in being, and "when the covenant extends to a thing which is not in being at the time the demise made, it cannot be appurtenant or annexed to the thing that hath no being." In this connection it is argued with force that since the new and improved signals were certainly not in being when the contract was signed, they could not be appurtenant or annexed to the lease granted by the contract.

The fact that the signals were not *in esse* did not bring the covenant in reference to altering, improving and erecting them within the rule.

In order for the covenant to be construed as one running with the land, unaffected by the rule referred to, it is not necessary that the thing to be supplied by the covenantor in implementing the use and enjoyment of the demised

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premises to be *in esse* when the promise is made so long as that to which it is to be "appurtenant or annexed" is in existence. In the case of Atlanta, Knoxville and Northern Railway Company *v.* McKinney, *supra,* this principle finds pronouncement.

In the instant case the crossing of the railroad tracks was presently existing when the contract was entered into; it was the thing to which the new and improved signals were to be added so as to effect the use and enjoyment of the easement granted.

So we conclude that the covenant in reference to the alterations, improvement and installation of new and improved signal was a covenant running with the land, so that the defendant as the Flint River & Gulf Railroad Company's successor in title to the easement created by the contract was bound to perform it.

The defendant contends that the contract upon which the suit is predicated is too indefinite as to the time of its performance to be enforceable. The point is not well taken. The contract is perpetual in its nature. While the defendant enjoys the right to the easement created by it, he must abide by its terms and perform its valid covenants.

The defendant further urges that the provisions of the covenant by which Flint River & Gulf Railroad Company, its successors and assigns are obligated to erect new and alter and improve existing signals, is too indefinite to be enforceable because it does not describe nor designate with sufficient particularity the kind of signals, quality or quantity of signals that must be installed to meet the requirements of the covenant, nor yet, what work is to be done or materials furnished in making the alterations, and improvements called for by the covenant.

The words "new and improved" are no more definite than the term "first class and permanent" held by the Supreme Court in the case of Hart *v.* Georgia Railroad Company, 101 Ga. 188 to be too indefinite to serve as a descriptive phrase, and the contract is not any more definite as to what is to be done or furnished in the alterations and improvements of the signals.

The plaintiff insists that the contract stipulates with complete precision what the defendant is obligated to do and furnish in complying with the covenant.

The plaintiff contends that under certain provisions of the contract the covenant in reference to the signals was to be performed in a manner satisfactory to it, and that its decision as to what must be done and furnished by the defendant in altering and improving the existing signals and installing new ones was according to the terms of the contract conclusive. Hence that the contract was certain for the reason that it could be made certain by plaintiff determining precisely what it would require of the defendant as faithful performance of the covenant.

In this connection the plaintiff stoutly maintains that a contract which without more particularly defining what is to be done by one under the duty to perform a covenant therein contained, gives to the party for whose benefit the covenant is made, the right to require as performance thereof anything in the realm of reason is valid and enforceable.

In support of this position the plaintiff brings to the attention of this court a number of interesting cases of various jurisdiction.

There is a Georgia case, MacKenzie *v.* Minis, *et al.*, 132 Ga. 323 we think is equally good authority for what is actually held in those cases.

Neither the cases cited by the plaintiff nor the MacKenzie *v.* Minis case hold an undertaking to do the absolute will of another and to do or supply whatever he may reasonably demand without other limitations and designation of what the promisor must do in the discharge of his promise is legal and enforceable.

The species of contract that those authorities refer to is the agreement of a promisor to deliver certain goods, render specific services or to erect a described structure to the satisfaction of the promisee. The parties to contracts of that nature know with reasonable certainty what is required of the promisor; there is a meeting of the contracting minds.

Those cases have no application to a situation such as is presented by the facts of this case. This is true because here there was no meeting of the minds of the contracting parties as to what would constitute a performance of the covenant, the performance of which would except for its indefinite character, be binding upon the defendant. The railroad executives when committing their respective railroads to the contract, could not have contemplated what the plaintiff might in the dim future reasonably require to be done in the alteration, improvement and installation of the signals. Indeed, the plaintiff's officials could not have conceived any definite idea of what they or their successors in future years might demand.

So even if the plaintiff is correct in its construction of the contract, there was no meeting of the minds of the parties, plaintiff and Flint River & Gulf Railroad Company, the defendants predecessor in title as to what was to constitute performance of the covenant for the breach of which the suit was brought. Consequently, the contract would, even accepting the plaintiff's interpretation of it, be unenforceable.

It is well to observe in connection with the subject here discussed that under the law of this state to agree that the performance by one party must be satisfactory to the other is not of the same legal import as an agreement to perform the contract to furnish what ever may be reasonably required by another. The former type of agreement simply carries with it the right, whether reasonable or not, to in good faith, reject what is offered by the other party as compliance with the contract. MacKenzie *v.* Minis, *et al.*, *supra.* It does give option to the promisee to choose something else not contemplated by either party to the contract. The latter vest in the promisee the right to choose anything within the scope or reason. The one rests soundly and logically upon the basis of common conception or a meeting of the minds of the contracting parties as to what will amount to carrying out the contract. The latter does not possess that basic foundation.

Moreover, a careful analysis of the contract reveals that it really is not susceptible to interpretation given it by the plaintiff. The only three expressions contained therein that could be construed to give the plaintiff an option as to what was to be done in the performance of the covenant relating to the signals are; first, the words contained in the first clause seventh paragraph of the contract which relates only to the installation of signals and gates, and has no application whatever to the signal referred to in clause three of the same paragraph. In clause two and three of the paragraph referred to is contained the stipulation that the signals be altered, improved and installed under the plaintiff's "plans and directions". Both of these phrases relate not to the quantity and quality of what is to be furnished in complying with the covenant but simply the manner in which it is to be performed. Words and Phrases, Volume 12, Page 476; Noice *v.* Schell, 52 A. L. R. 965.

So the conclusion is inescapable that the contract did not reserve to the plaintiff an unlimited right to determine the nature and extent of the defendant's performance of the covenant referred to.

The plaintiff earnestly argues that if this contract is held to be too vague to be legally binding upon the defendant the holding would affect the validity of the many like contracts. The thought is also presented with much force that contracts that to be performed or carried out over a considerable period of time cannot possess as pronounced quality of certainty and preciseness as those that are to be presently executed. But the courts cannot concern themselves with expediency or look to the industrial welfare of society in making their decisions.

Contracts can be conveniently couched in such language and have embodied in them stipulations that make them certain even when they are to be performed over long and indefinite periods of time and under ever changing conditions.

In the contract now under consideration the signals to be supplied could have been legally described as "com-

parable in number, nature and design to those commonly used or in vogue in the general territory served by the contracting railroads, and by railroads of the class to which either or both of the railroads belonged at such times as the signals might be installed agreeable to the terms of the contract." Or it might have been provided that such signals be installed as would meet the approval of the public authorities having jurisdiction of such matters at the time of their installation. The vogue in signals might vary, but the requirements of such provisions would always furnish a fixed standard, a criterion as to the kind, quality, and quantity of the signals to be supplied.

The court erred in not sustaining the defendant's general demurrer.

In these circumstances it is hardly necessary to review the decision of the trial court further than to observe that while the petition set forth no cause of action, the evidence did prove the case as laid therein, and did not disclose any defense to the action, that did not clearly appear from the petition itself. So under authority of Daniel *v.* Powell, *et al.*, Receivers, 45 Ga. App. 473, the court having overruled the general demurrer, erred in granting the non suit.

Let the judgment on both the main bill of exceptions and the cross bill be reversed.

Judgment reversed. Felton, C. J., and Nichols, J., concur.

Decided February 17, 1955.

Appendix B.

Agreement Dated May 21, 1906.

THIS AGREEMENT, made and entered into on this the 21st day of May, 1906, between the ATLANTIC COAST LINE RAILROAD COMPANY, a corporation created and organized under the laws of the State of Virginia, of the first part, and the FLINT RIVER & GULF RAILROAD COMPANY, a corporation under the laws of the State of Georgia, of the second part:

WITNESSETH:

THAT WHEREAS the party of the second part desires, in the construction of its railroad, to cross with one track at Sylvester, in the County of Worth, Georgia, where the line of the said second party now joins with the line of the first party, and the exact location of the physical crossing to be hereafter fixed and determined at the time of construction by the said first party; and

WHEREAS, as a condition precedent to the enjoyment of the privileges sought to be obtained by said party of the second part, it is essential to the public safety, and to the convenience of the said party of the first part that the construction and use or employment of the proposed crossing by the party of the second part in the passage of trains or otherwise should be so regulated and governed as in no manner to endanger the one or impair the other; and

WHEREAS, justice to the interest of the said party of the first part demands that proper guarantee of indemnity should be given for all losses, injuries or damages which it may sustain by reason of such crossing or its employment by said party of the second part, which do not result from any negligence on the part of the agents and employes of said party of the first part.

NOW, THEREFORE, The Atlantic Coast Line Railroad Company, in consideration of the premises, does hereby grant to the Flint River & Gulf Railroad Company, its

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successors and assigns, the right to cross the lands or right of way and railroad track of the Atlantic Coast Line Railroad Company, at the point aforesaid, upon the conditions hereinafter specified; the said conditions being as follows, to-wit:

FIRST: That the crossing herein specified is confined to the main track of the Flint River & Gulf Railroad Company, and that same shall be in such manner as not to obstruct the drainage of the Atlantic Coast Line Railroad Company's roadbed.

SECOND: That the plans for such crossing and the material employed for its construction and the culverts which may be necessary to provide for proper drainage of the said party of the first part's roadbed, shall be submitted to and in all respects acceptable to its Engineer.

THIRD: That every item attending the construction of said crossing and the repairs and renewals of the same shall be borne and paid by the said party of the second part, whether incurred directly, by its agents or by the proper officials of the said party of the first part, and the construction of said crossing, and the repairs and renewals of same shall be so arranged as not to interfere with the regular movements of the trains of the party of the first part.

FOURTH: That it shall be the duty of the party of the second part to keep and maintain said crossing in every part and particular, including grading, culverts, cross ties, rail crossings and planking, in a condition and state of repair at all times acceptable to the Engineer of Roadway of the party of the first part. That the said crossing shall not be constructed, nor shall any alteration or repair thereof be at any time made except under the supervision of the proper officer or agent of the party of the first part. And when such crossing is to be constructed, altered or repaired as aforesaid, the party of the second part shall notify the party of the first part, who shall promptly direct its officer or agent to superintend the work.

FIFTH: That it shall be the duty of the said party of the second part to provide promptly, at its own expense, steel rail crossing for any additional tracks which may hereafter be constructed at the point of crossing by the party of the first part, and all additional expense incurred in consequence of the existence of said crossing shall on request be forthwith paid to the party of the first part by the party of the second part, and generally the terms and conditions under which the track of the party of the second part, its successors or assigns, are crossed by such additional tracks of the party of the first part, its successors or assigns, shall be the same as though such additional tracks were the main track of the party of the first part and the party of the second part were crossing same.

SIXTH: That no part of the track of the party of the second part embraced within the limit of the roadway of the party of the first part shall be occupied by standing locomotives or cars, or by halting trains of the said party of the second part, or either party operating over or in connection therewith.

SEVENTH: That in order to enable the said party of the second part to exercise successfully the privilege herein granted, without imposing hindrance or delay to the movement of trains on and over the tracks of the said party of the first part, and without injury or detriment to the same, by interference or otherwise with its operations; it shall be the duty of the party of the second part to erect, maintain and operate gates including derailing switches; the plans of the same and the erection to be approved by the Engineer of Roadway of the said party of the first part.

And whenever it shall be required by the public authorities of the State of Georgia, or it shall be deemed proper and advisable by the party of the first part, an interlocking plant including the proper protection of the crossing by interlocking signals and derailing switches shall be constructed and maintained at the said crossing under the plans and direction of the said party of the first part. The cost of the installation of said interlocking plant to be

borne by the parties hereto in equal proportions, that is, half and half; but the cost of maintenance of the said interlocking plant and its operation shall be at the sole cost of the party of the second part. The said party of the second part will further alter and improve or erect new and improved signals upon demand of the party of the first part under the same terms as provided for in the original installation.

EIGHTH: That in order to insure the public safety it shall be the imperative duty of the said party of the second part, or any party or parties who may operate their road, to cause all the trains, whether regular or irregular, or locomotives or cars, to approach said crossing with caution, and at a rate of speed not exceeding five (5) miles per hour, and to require its conductors, engineers and other persons having charge of its trains, locomotives or cars (unless permission to the contrary be given in writing by the General Manager of the party of the first part) not to cross the roadway and tracks of the party of the first part unless they have first positively stopped such trains, locomotives or cars. It being understood when trains on both tracks are approaching the said crossing at the same time, that the trains of the party of the first part, whether passenger or freight shall be entitled to precedence, and the trains or train of the party of the second part remaining standing until the crossing is passed by the train of the party of the first part.

NINTH: That it shall be the duty of the said party of the second part, and it does hereby undertake and agree to provide promptly and at its own proper cost such other things as the Engineer of Roadway of the party of the first part may require or as experience may hereafter suggest to be promotive of the public safety or the interest of the said party of the first part in connection with said crossing.

TENTH: That it shall be the duty of the said party of the second part, and it does hereby fully agree and undertake upon the demand of the party of the first part to pay, make good and fully indemnify the party of the first part,

against all proper claims for loss, injury or damage, which it or any of its employes or passengers or any other person or persons may sustain by accident, collision, delay or hindrance, or from any other cause arising from or growing out of the acts or omissions of said party of the second part or its agents, or employes in the construction, use or employment of said crossing or in the exercise of any of the rights and privileges granted to it hereunder.

ELEVENTH: It is expressly understood and agreed, that the rights and privileges hereby granted to the Flint River & Gulf Railroad Company, its successors and assigns, shall exist and continue only so long as the conditions, covenants and stipulations on its and their part to be kept and performed are fully kept and performed, and the Flint River & Gulf Railroad Company expressly covenants and agrees, and its successors and assigns, to perform all the conditions and stipulations hereby imposed and that all the preceding covenants, agreements and stipulations shall be binding upon and inure to the benefit of the parties thereto respectively, their respective successors and assigns.

IN TESTIMONY WHEREOF, the corporate seals of the parties hereto have been severally affixed by the respective officers, and duly attested by their respective secretaries, on the day and year first above written.

ATLANTIC COAST LINE RAILROAD COMPANY

By J. R. KENLY

Attest:

GEO. B. ELLIOTT,
Asst. Secretary.

FLINT RIVER & GULF RAILROAD COMPANY

By J. S. BETTS, President.

Attested:

J. L. EVANS,
Secretary.

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HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 399

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

GEORGIA, ASHBURN, SYLVESTER & CAMILLA RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia, or, in the Alternative, to the Court of Appeals of Georgia.

BRIEF FOR RESPONDENT IN OPPOSITION.

JULIAN WEBB,
Donaldsonville, Georgia,
VANCE CUSTER,
CHARLES H. KIRBO,
Bainbridge, Georgia,
Attorneys for Respondent.

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia, or, in the Alternative, to the Court of Appeals of Georgia.

BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

Petitioner has failed to comply with Rule 23f of the Rules of this Court and the petition does not therefore show whether or not the federal question alleged to be involved was timely and properly raised. Had this rule been complied with, the petition would have shown that the Supreme Court of Georgia was without jurisdiction

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to review the decision of the Court of Appeals of Georgia and that this Court is without jurisdiction to review same.

The constitutional question was first injected, and then not sufficiently, in the petition for certiorari to the Supreme Court of Georgia in paragraph 4 of the conclusion in said petition in the following language: "The decision of the Court of Appeals so clearly disregarded the valid and enforceable terms of the contract upon which the suit is predicated that it amounts to and deprives the plaintiff of due process of law under the Fourteenth Amendment under the Constitution of the United States."

This question was never argued in either Court and in the final motion for reconsideration of the judgment of the Supreme Court of Georgia denying application for certiorari, the so-called constitutional question was not raised or referred to and the Court was not asked to reconsider that question.

For the reason that the constitutional question was not timely and sufficiently raised in the trial court, neither the Georgia Appellate Court nor this Court has jurisdiction. Likewise, since the question was not preserved in the motion for reconsideration, this Court is without jurisdiction.

QUESTIONS PRESENTED.

The questions presented are:

1. Has the petitioner timely and sufficiently raised the alleged constitutional question and does this Court have jurisdiction to hear and determine the same?

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2. Assuming that the Court has jurisdiction, is a federal or constitutional question presented?

3. If so, did the Court err in holding the contract unenforceable?

ARGUMENT.

1. No Federal or Constitutional Question was Timely or Sufficiently Raised in the State Court.

Petitioner was non-suited in the trial court and in conformity with the State practice, the Court of Appeals reviewed the decision of the trial judge and held that the contract sued upon was unenforceable.

In none of the pleadings or briefs in the Court of Appeals was a federal or constitutional question raised. In the motion for re-hearing, addressed to the Court of Appeals, no federal or constitutional question was raised but in the petition for certiorari to the Supreme Court of Georgia, reference was made to the fourteenth amendment to the Federal Constitution, without specifying or defining just how the decision of the court violated this amendment. Under the Georgia rule, assignments of error upon constitutional questions which are raised for the first time in the bill of exceptions will not be considered. *Dunaway v. Gore,* 164 Ga. 219 (138 S.E. 213). *Beckman, et al. v. Atlantic Refining Co.,* 181 Ga. 456 (182 S.E. 595).

A constitutional attack upon an act or statute, which does not allege specifically how or wherein the act or

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statute violated a designated provision of the constitution, is insufficient to present any question for review. *Persons v. Lea,* 207 Ga. 384 (61 S.E. 2d 832).

Likewise, the Supreme Court of Georgia is not called upon to pass on constitutional questions unless such questions are passed upon by the trial judge and clearly specified.

"This Court will not pass upon the constitutionality of an act of General Assembly, unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge. *Yarbrough v. Georgia Railroad & Banking Co.,* 176 Ga. 780 (168 S.E. 873).

"In order to raise a question as to the constitutionality of a statute, 'the statute which the party challenges and the provision of the constitution alleged to have been violated, must both be clearly specified; and it must also be shown wherein the statute violates such constitutional provision.' *Abel v. State,* 190 Ga. 651, 653 (10 S.E. 2d. 198). See *Stewart v. Board of Commissioners of Echols County,* 192 Ga. 139 (2) (14 S.E. 2d. 728)."

Huiett, Commissioner, et al. v. Dayan, et al., 194 Ga. 250, 21 S.E. 2d 423.

These rules of practice have been approved and recognized by this Court. "It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for re-hearing in the Court of

Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirements of the Supreme Court of Georgia for definiteness." Citing *Persons v. Lea supra; Steambridge v. State of Georgia,* 1952, 72 S. Ct. 834, 343 U.S. 541, 96 L. Ed. 1130. Continuing, the Court said: "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." Even if the Court of Appeals be regarded as the trial court as respects this particular issue, the constitutional question could have and should have been raised in the motion for rehearing addressed to the Court of Appeals.

Where the highest court of the State has declined to consider federal constitutional questions on the ground that they were not raised at the trial, the Supreme Court of the United States is without jurisdiction to consider them. *Pennsylvania R. Co. v. Illinois Brick Co.,* 1936, 56 S. Ct. 556, 297 U.S. 441, 80 L. Ed. 796. *Huebert v. Chicago,* 1906, 26 S. Ct. 617, 202 U.S. 275, 50 L. Ed. 1026; *Radio Station WOW, Inc. v. Johnson,* 1945, 65 S. Ct. 1475, 326 U.S. 129, 89 L. Ed. 2092. *People v. State of California,* 1953, 73 S. Ct. 293, 344 U.S. 357, 97 L. Ed. 387.

To give the Supreme Court jurisdiction of error in state court mere assertion of a claim in respect of some

constitutional right is not enough but there must be a real and substantial controversy of the required character which deserves serious consideration. *U.S. Fidelity & Guaranty Co. v. State of Oklahoma,* 1919, 39 S. Ct. 399, 250 US 111, 63 L. Ed. 876.

Even had the question been sufficiently and timely raised when petitioner filed a petition for reconsideration to the Supreme Court of Georgia in which the federal or constitutional question was not again urged or considered, such question was abandoned. *Campbell v. Burton,* 182 Ga. 354, 185 S.E. 323; *Ellington v. State,* 204 Ga. 456, 49 S.E. 2d. 872.

2. No Federal or Constitutional Question is Presented.

It is contended that section 26b of Title 49 USC is involved. Certainly this could not inject a federal question. The state court was not called upon to construe or apply this section and the decision of the state court is in nowise in conflict with the authority granted the Interstate Commission under that Section. It appears from the record that the commission had taken two steps in respect to the railroad crossing involved. One, the commission had directed that the petitioner make certain repairs and improvements on the crossing and second, the commission had relieved the respondent from the burdens of the order requiring the crossing to be repaired and improved. (Brief of evidence in Worth Superior Court, page 12.) (The respondent does not have the benefit of the record in this court and can not refer to the pages therein.) Should it be contended that the Interstate Commerce Commis-

sion has exclusive jurisdiction over this matter, then the petitioner's remedy was to pursue the question further before that body. The state court has not arbitrarily taken jurisdiction of the matter but it is through the action of the petitioner that the state court was called upon to pass on the validity of the contract, construe the same and adjudicate the rights of the parties thereunder. The contract in nowise refers to the Interstate Commerce Commission and the question is only incidentally raised in that the petition requests the court to substitute the Interest Commerce Commission for other governing bodies mentioned in the contract.

While the casual reference to the 14th Amendment of the Federal Constitution in the application for certiorari to the Supreme Court of Georgia did not sufficiently raise the constitutional question, even if it had, this Court would have no jurisdiction to pass upon the same. The petition did not complain of any statutes or legislation of the Court depriving it of any constitutional rights but merely that the decision of the Court of Appeals deprived it of such rights.

In *Tidal Oil Co. v. Flanagan,* 1924, 44 S. Ct. 197, 263 US 444, 68 L. Ed. 382, this question was passed upon in unmistakable language. "The mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the Federal Constitution. Plaintiff's claim whatever it was does not raise a substantial federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction."

This case was cited, approved and followed in *Barraus v. Jackson*, 1952, 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031.

The Supreme Court of the United States will not review a state decision resting on an adequate and independent non-federal ground even though the state court may have also summoned, to its support, an erroneous view of Federal law. *Radio Station WOW, Inc. v. Johnson, supra.*

The decision of the Court of Appeals is a construction of the Georgia contract dealing with Georgia property supported by Georgia authority and decides only state questions.

If it be contended that the construction of any contract dealing with real property which was owned, used or passed over by persons or corporations dealing in Interstate Commerce, presents a federal question it would present the federal court with jurisdiction of a substantial part of all litigation arising out of land contracts in the United States.

3. The Court did not Err in Holding the Contract Unenforceable.

Petitioner does not even contend that the decision of the Court of Appeals reverses any previous decisions but contends that it is in conflict with general rules of law. We feel that the written opinion of the Court gave ample authority to support it but it is supported by many other Georgia cases.

"The rule as to certainty is thus laid down by Chitty on Contracts: 'The rule as to certainty is that the agreement must be so certain and complete that each party may have an action on it.' The converse holds equally true, viz., that where a contract is so uncertain and incomplete that neither party can maintain an action on it, it is void for uncertainty." *Carr v. L. & N. Railroad Co.*, 141 Ga. 223, (80 S.E. 716.) In that case, the plaintiff was suing on a contract where he was to have the use of water, free of charge, on his premises from a water tank belonging to the railroad company. The court points out that the contract does not designate any specific quantity of water that the plaintiffs are entitled to use. "No amount being specified, the alleged agreement is void under the rule laid down above."

The contract in the instant case is equally uncertain as to the extent of the signalling devices to be installed. The second party is required to improve or erect new and improved signals deemed proper and advisable by party of the first part.

"A contract by which a banking corporation agreed to make periodic loans of money to another from time to time within a stipulated period, without any limitation on the aggregate to be loaned at any one time, but that the loans be made from time to time as the borrowers needs might require, was too indefinite and uncertain, as respects the obligation resting upon the bank, to be capable of enforcement." *Savannah Bag Co. v. Citizens Bank & Trust Co.*, 40 Ga. App. 370, 149 S.E. 710.

contract, such change is presumed to be excepted therefrom."

Certainly the construction of a contract relating to real property located in the State of Georgia, dealing with covenants running with the land presents a state question.

The opinion written in the Court of Appeals is based upon sound reasoning and is amply supported by proper Georgia authorities and should be affirmed.

CONCLUSION.

The Court should deny jurisdiction of the writ, or if jurisdiction is assumed, the decision of the state court should be affirmed.

Respectfully submitted,

JULIAN WEBB,
Donaldsonville, Georgia,
VANCE CUSTER,
Bainbridge, Georgia,
CHARLES H. KIRBO,
Bainbridge, Georgia,
Attorneys for Respondent.